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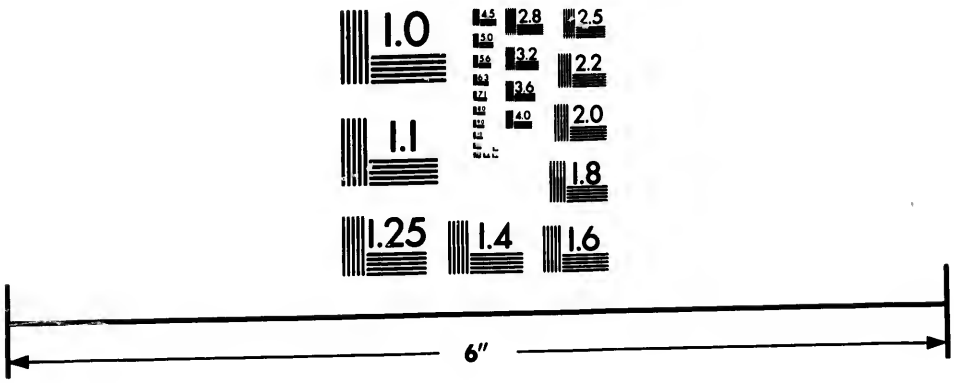

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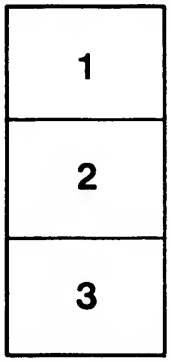
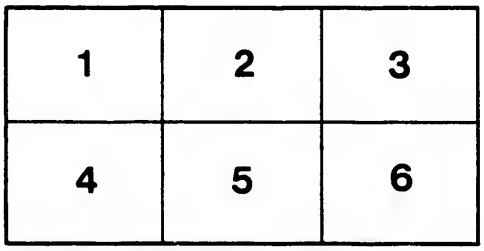




No.

In the Court of Queen's Bench.

(APPEAL SIDE.)

ANDREW WHITE,
Defendant in the Court below,
APPELLANT:

THOMAS NYE,
Plaintiff in the Court below,
RESPONDENT:

APPELLANT'S CASE.

Dt. 12th Jan 1859

APPELLANT'S CASE.

Dt. 12th Jan 1859

PROVIN
LO

PROVINCE OF CANADA,
LOWER CANADA,
TO WIT:

IN THE COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

No.

ANDREW WHITE,

Defendant in the Court below,

APPELLANT:

THOMAS NYE,

Plaintiff in the Court below,

RESPONDENT:

APPELLANT'S CASE.

The judgment appealed from, is one rendered by the honorable Mr. Justice Charles Mondelet, holding the Superior Court in Montreal, dismissing the motion of the appellant for a jury trial.

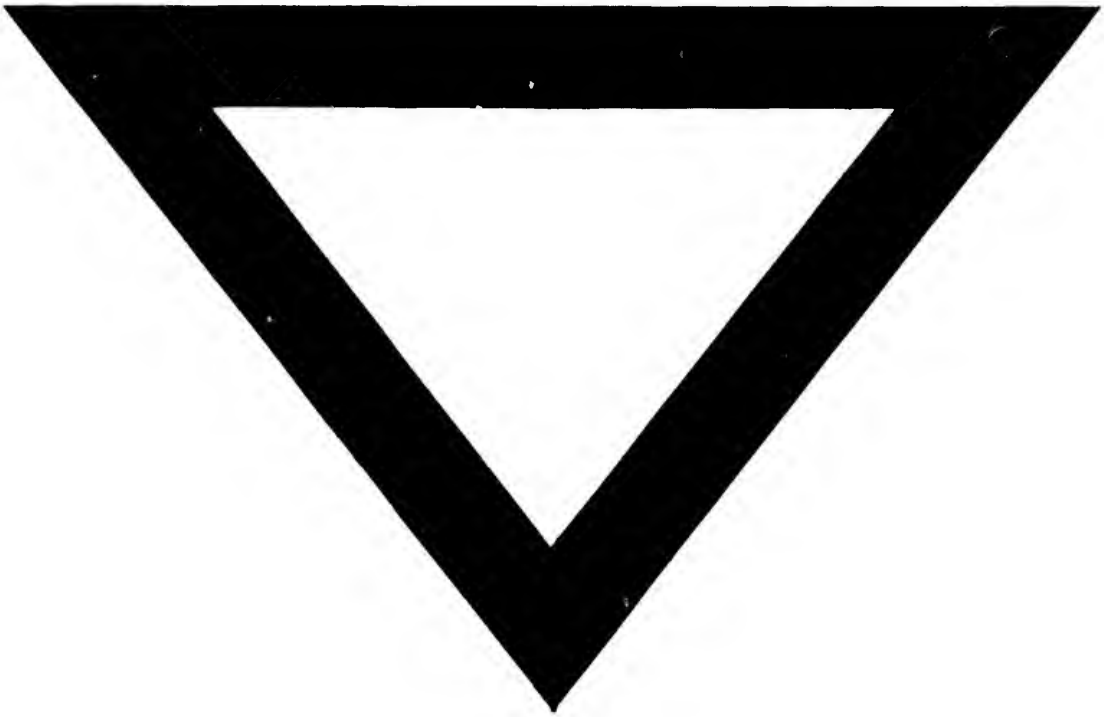
The action is one of damages for slander, the Defendant pleaded matter in mitigation, and alleged having made a tender of a certain amount to leave no pretext to the Plaintiff for going on with his action.

This plea was dismissed on demurrer by his Honor Mr. Justice Smith, who held that under the general issue, the Defendant could prove all the allegations of his plea.

The dismissal of the plea left the Appellant with a *Defense en fait*, but without any option for a jury trial.

The Appellant thought it his duty before going to the expense of an appeal to renew his application for a jury-trial, and he made his motion accordingly. His Honor Mr. Justice Mondelet dismissed it *on the ground that the Appellant had no other recourse than that of appealing from the judgment of his Honor Mr. Justice Smith dismissing the plea*, which judgment Mr. Justice Mondelet thought an erroneous one. These two conflicting decisions arise from the essentially different view the two learned judges take of the effect of the general issue, Mr. Justice Smith looking upon it as having the same effects as it has in England in similar cases, while Mr. Justice Mondelet considers it in the light of a mere denegation of the allegations of the Plaintiff, without allowing the Defendant to prove any matter in mitigation and *a fortiori* in this case without allowing him to prove the tender by him made.

This Honorable Court has only allowed the appeal from the judgment dismissing the motion for a jury-trial. Whatever may be the appellant's position as to proof in the absence of a special plea, he has a right since he declared his option formally to that effect at the time he fyled his plea, that the evidence on both sides, whatever it may be shall be adduced before a Jury, and that the Jury and not the Court shall determine the amount of damages the Plaintiff has suffered, and the question will then remain if the tender made should be found to cover the amount of the verdict, whether the Plaintiff or the Defendant should pay the costs of the action.

LAFLAMME, LAFLAMME & BARNARD,
Attorneys for Appellant

Montreal, October, 1858.